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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BANK OF NOVA SCOTIA, *Petitioner*,

—v.—

UNITED STATES OF AMERICA, *Respondent*.

WILLIAM A. KILPATRICK, *et al.*, *Petitioners*,

—v.—

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal district court may exercise its supervisory power to dismiss an indictment before trial, absent proof of actual prejudice to the defendant, where prosecutorial misconduct of the grand jury process is so repeated and egregious as to undermine the integrity of the criminal justice system.

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT[1/]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-partisan organization of more than 250,000 persons dedicated to protecting and preserving the civil rights and civil liberties guaranteed by law. The ACLU Foundation of Colorado is one of its state affiliates.

Since its creation 60 years ago, the ACLU has worked to ensure the integrity and independence of the criminal justice system. Within that system, "[t]he grand jury has always occupied a high place as an instrument of justice . . . -- so much so that it is enshrined in the Constitution."

1/ Letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983). This Court has "consistently stood ready to defend [the grand jury] against unwarranted intrusion," id. at 425, "find[ing] actual prejudice [to the defendant] irrelevant," Young v. United States, 107 S.Ct. 2124, 2138-39 n. 21 (1987), where the integrity of the criminal justice system is at stake.

This case involves the supervisory authority of the federal district courts to dismiss an indictment before trial where prosecutorial misconduct in the grand jury process is so egregious as to "undermine[] confidence in the integrity of the criminal proceeding." See id. at 2137. Under such circumstances, the injury to the grand jury process is "not limited to the defendant" but rather extends "to the jury system, to the law as an institution, to the community

at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

The decision of the Tenth Circuit impermissibly deprives the federal district courts of supervisory authority to dismiss an indictment prior to trial absent proof of actual prejudice to the defendant. This new and unwarranted standard effectively eliminates the power of district judges to deter prosecutorial misconduct before the grand jury.2/

Certain instances of egregious prosecutorial misconduct can dramatically

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2/ In United States v. Mechanik, 475 U.S. 66, 72 (1986), Justice Rehnquist's majority opinion specifically left open the question of whether the federal district courts may exercise supervisory authority to dismiss an indictment before trial because of prosecutorial misconduct in the grand jury process absent proof of actual prejudice to the defendant.

affect the integrity of the criminal justice system even if a particular defendant cannot or does not prove actual prejudice. "Harmless error" analysis, which focuses exclusively on prejudice to the particular defendant, overlooks not only the effect of such misconduct on the criminal justice system, but also the problems that accompany proof of actual prejudice. As such, the analysis is dangerously inappropriate. Because the federal district courts must not be deprived of remedies that they need to exercise supervisory authority over the grand jury process -- in order to promote public respect as well as the integrity of the criminal justice system -- the ACLU submits this brief amici curiae in support of petitioners.

ARGUMENT

I. THE DISTRICT COURTS MUST BE AUTHORIZED TO DISMISS AN INDICTMENT BEFORE TRIAL WHERE WILLFUL AND REPEATED PROSECUTORIAL MISCONDUCT IN THE GRAND JURY PROCESS UNDERMINES THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

This case raises important questions about the function of the grand jury and the ability of district judges, exercising their supervisory authority, to curb prosecutorial abuse of the grand jury process.

A. The Grand Jury is Essential to the of the Criminal Justice System

The need for supervisory authority to dismiss an indictment before trial because of prosecutorial misconduct relates inextricably to the role of the grand jury within our system of criminal justice. The

historic role of the grand jury, of course, is "to provide a fair method for instituting criminal proceedings," Costello v. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against arbitrary and oppressive governmental action," United States v. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecting [of] citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

Convening "as a body of lay persons acting in secret," United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983), the grand jury must not only be "independent and informed," but must also "stand between the accuser and the accused . . . to determine whether a charge is founded upon reason or dictated by an intimidating

power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962).

In fulfilling its constitutional mandate, the grand jury is especially dependent upon the prosecutor throughout the course of its proceedings. In principle, as this Court has explained,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutor "draws up the indictment, calls and examines the grand jury witnesses, advises the grand jury as to the law, and is in constant attendance

during its proceedings." United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983). "By virtue of their position," as one court acknowledges, prosecutors have "gained such influence over grand juries that these bodies' historic independence has been eroded." Ibid. One commentator states:

> [A] prosecutor can greatly influence the grand jury because he or she controls the proceedings and the flow of information. This unbounded influence has led critics to characterize the grand jury as a "rubber stamp" of the prosecutor. These critics fear that jurors passively accept whatever a prosecutor presents. The jurors are inexperienced in legal matters and therefore are inclined to rely improperly on the prosecutor.

Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, 45 Ohio St. L.J. 1077, 1079-80 (1984).

The fact that grand jury proceedings are secret and ex parte magnifies legitimate concerns about the influence of the prosecutor on the independence and impartiality of the grand jury. Public confidence thus requires that prosecutors respect and abide the constitutional, statutory and judicial limits imposed on their conduct during the grand jury process. When the purposes of the grand jury are undermined by severe, deliberate and repeated instances of prosecutorial misconduct, the credibility and integrity of the criminal justice system are themselves put at risk.

B. Supervisory Authority Over the Grand Jury Process Allows the Federal Courts to Ensure and Enhance The Integrity of the Criminal Justice System

The federal courts have an interest "in preserving and protecting the

appearance and the reality of fair practice before the grand jury . . . ." United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). This important institutional interest is separate and "independent of [the judiciary's] concern for the rights of the particular defendant." Ibid.

This Court has repeatedly recognized that "[t]he untainted administration of justice is . . . one of the most cherished aspects of our institutions," Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956), requiring "the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." Ibid. As Justice Brandeis warned in an analogous context, lawless government behavior "breeds contempt for the law" and "invites

every man to become a law unto himself." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Use of the district court's supervisory authority to promote this important institutional interest has, with good reason, traditionally not required proof of actual prejudice to the defendant. See generally Note, The Supervisory Power of the Federal Courts, 76 Harv.L.Rev. 1656, 1657 (1963). An emphasis on actual prejudice ignores important institutional values in the criminal justice system that are distinct from the individual rights of a particular defendant. Forms of misconduct harmless to the particular defendant can nevertheless have a deleterious effect on public respect for the criminal justice system, as well as on the continued viability of that system.

Deterrence of such misconduct is a legitimate concern of courts responsible for "maintaining civilized standards of procedure and evidence in the administration of criminal justice." McNabb v. United States, 318 U.S. 332, 340 (1943).3/

3/ The Fourteenth Amendment does not require a criminal defendant to show "actual bias in the tribunal . . . ; due process is denied by circumstances that create the likelihood of appearance of bias." Peters v. Kiff, 407 U.S. 493, 502 (1972). See In re Murchison, 349 U.S. 133, 136 (1955)("Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness"); see also Taylor v. Louisiana, 379 U.S. 466 (1965); Tumey v. Ohio, 273 U.S. 510 (1927). Similarly, "[w]here the interest infringed is sufficiently important . . . [this Court has] not hesitated to find actual prejudice irrelevant when utilizing supervisory authority." Young v. United States, 107 S.Ct. at 2138-39 n.21, citing Ballard v. United States, 329 U.S. at 187.

C. Federal District Courts Must be Authorized to Dismiss an Indictment Before Trial, Absent Proof of Actual Prejudice, Where Prosecutorial Misconduct Impairs The Integrity Of The Criminal Justice System

District judges possess supervisory authority not for the purpose of punishing prosecutors but rather to ensure that the criminal justice system works the way it is designed to work. They are in the best position to know when the criminal justice system has broken down because they work on a daily basis with the assistants in the office of the United States Attorney. When such a breakdown occurs, it is absolutely critical that the lower court retain not only authority to dismiss criminal indictments as a deterrent, but also discretion to determine when such a deterrent is necessary to preserve the integrity of the criminal justice system.

Dismissal of the indictment before trial because of prosecutorial abuse is obviously a serious step. There is no evidence, however, that it is taken lightly by district judges. Rather, the sanction is used with "extreme caution," see United States v. Asdrubal-Herrera, 470 F.Supp. 939, 942 (N.D. Ill. 1979). The published cases show that successful motions to dismiss because of serious irregularities in prosecutorial behavior are, in fact, rare. See e.g., United States v. DeFabritus, 605 F.Supp. 1538, 1543 (S.D.N.Y. 1985); United States v. Kazonis, 391 F.Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.), cert. denied, 429 U.S. 826 (1976).

Rather, the lower courts exercise supervisory authority to dismiss only "when government conduct has placed in jeopardy

the integrity of the criminal justice system," United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979), or "if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends," United States v. Serubo, 604 F.2d at 817, or if the incidents of prosecutorial misconduct were "flagrant and unconscionable." United States v. Hogan, 712 F.2d at 762.

In United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977), for example, the court declined to dismiss an indictment where the United States Attorney had failed to inform a target defendant that he was the subject of a grant jury investigation. The court warned, however, that dismissal would be appropriate if similar

prosecutorial inaction tainted future grand jury proceedings:

> [T]here is no suggestion that the practice of giving such warnings is long-established among the United States Attorneys of this Circuit . . . . [W]e have recognized that we have supervisory authority over the conducting of grand jury proceedings, [but] we have declined to exercise that power to require warnings of a statutory recantation right . . . . Thus in the future, United States Attorneys in the Third Circuit should not be surprised if, pursuant to our supervisory powers over the manner of conducting grand jury proceedings, we were to [dismiss an indictment for failure to warn] where, as here, specific inquiry is made on the defendant's behalf.

Id. at 1056. Adherence to this strict standard ensures that the judiciary's supervisory power in no way encroaches on the prerogatives of the other branches of government.

"Sparing use, of course, does not mean no use," as stated in an analogous context by the district court in United States v. Omni International Corp., 634 F.Supp. 1414, 1438 (D.Md. 1986). "Even 'disfavored remedies'. . . must be used in certain situations." Ibid. In the extreme case, the United States Attorney may fail to "recognize[] that . . . [h]e or she is 'an administrator of justice,'" see United States v. Gold, 470 F.Supp. 1336, 1347 (N.D.Ill. 1979), quoting United States v. Andrews, 444 F.Supp. 1238, 1244 (E.D. Mich. 1978), and act out of "zeal, malice, partiality or other prejudice." United States v. DiGrazia, 213 F.Supp. 232, 235 (N.D.Ill. 1963). Where the district court faces repeated instances of prosecutorial misconduct, uncorrected despite admonition from the bench, "judicial 'tongue clicking'

and adjurations as to the 'better practice' are likely to have little impact on the problem." United States v. Serubo, 604 F.2d at 817-18.

Under such circumstances, disciplinary actions or contempt proceedings will also not be adequate to preserve the integrity of the judicial system. The federal district courts have little, if any, control over disciplinary proceedings and, in any event, many instances of misconduct are not subject to contempt sanctions. See e.g., Vasquez v. Hillery, 474 U.S. 254, 262 & n.5 (1986).

In the extreme or egregious case, therefore, where prosecutorial misconduct or abuse is cumulative and repeated, dismissal is the only effective deterrent to preserve the integrity of the judicial process. As Judge Friendly explained in a

similar context, "a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants." United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (Friendly, J.).

As demonstrated by the following decisions, supervisory authority to dismiss the indictment before trial cannot and should not be limited to situations in which actual prejudice can be shown. Even in extreme cases, a number of reasons may preclude proof of actual prejudice. This Court has recognized, however, in analogous jury contexts, that the difficulty of establishing prejudice does not mean that the error is harmless. See Lockhart v. McCree, 476 U.S. 162 (1986).

In United States v. Gold, 470 F.Supp. at 1336, for example, the district court dismissed the indictment, following an evidentiary hearing that revealed "extraordinary facts," see In re November 1979 Grand Jury, 616 F.2d 1021, 1023 (7th Cir. 1980), including the prosecutor's conflict of interest, the withholding of exculpatory evidence, the destruction of potentially relevant evidence, improper testimony as a witness before the grand jury, and improper comments on the exercise of constitutional rights. "These circumstances," the district court stated, "revealing as they are, disclose a totality of grand jury abuse by government attorneys." United States v. Gold, 470 F.Supp. at 1355-56.

In United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975), the district court

likewise granted a motion to dismiss where the prosecutor obtained a second indictment by submitting to the grand jury transcripts of witness testimony before a prior grand jury. Over the preceding decade, the Circuit had issued a series of decisions "condemn[ing] the casual attitude with respect to the presentation of evidence manifested by the decision of the Assistant United States Attorney to rely on [hearsay] testimony," United States v. Estepa, 471 F.2d at 1135. In equal measure, the district court had warned against the use of hearsay where first-hand information from live witnesses was readily available. Nevertheless, the prosecutor relied on selective portions of a grand jury transcript that was known to be "permeated with perjurious statements as to crucial, material events," without advising

the grand jury as to the hearsay quality of the evidence presented. United States v. Gallo, 394 F.Supp. at 315. Granting the motion to dismiss, the district court made clear that other, less drastic sanctions had failed to achieve their desired effect:

> In the exercise of its supervisory powers over the conduct of judicial business in this District, this Court must not condone the actions of the prosecutor in the case at bar with "yet another admonition."

Id. at 316 (citations omitted).

The district courts have thus recognized that dismissal is a sanction to be used cautiously, a deterrent more often threatened than exercised. See e.g., United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983). In the appropriate case, however, exercise of such supervisory authority is essential lest the court be perceived to "brook behavior that degrades the grand jury into a rubber stamp, and the

testing of the prosecutor's evidence into an empty ritual." See United States v. Al Mudarris, 695 F.2d 1182, 1188 (9th Cir.), cert. denied, 461 U.S. 932 (1983). It is essential, therefore, that in an appropriate case, the district courts be able to back-up their admonitions and reprimands with the definitive action of dismissal.

II. THE PRACTICAL IMPOSSIBILITY OF PROVING ACTUAL PREJUDICE WOULD ELIMINATE DETERRENCE OF PROSECUTORIAL MISCONDUCT IN MANY CASES OF ABUSE

The decision below nevertheless authorizes district courts to dismiss criminal indictments only on a showing of actual prejudice to the defendant. As we have seen, harmless error analysis ignores the fact that repeated prosecutorial abuse may significantly impair the integrity of

the criminal justice system -- and public confidence in that system -- without causing actual prejudice that can be readily proved by a particular defendant.

A. Prosecutorial Misconduct Can Dramatically Impair Public Confidence Even if a Particular Defendant Does Not or Cannot Prove Actual Prejudice

Limiting the arsenal of weapons available to the district court in an egregious or extreme instance of prosecutorial misconduct can be expected to undermine public confidence in the criminal justice system. As this Court recently stated, even the "appearance of impropriety . . . diminishes faith in the fairness of the criminal justice system in general." Young v. United States, 107 S.Ct. at 2139.

The grand jury has been the focus of increasing criticism in recent years.[4/] Some of the criticism has focused on the availability to the prosecutor of a "terrible array of coercive methods" that can be used in secret and out of public view. Ibid. See United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983)("The gain in prosecutors' influence over grand juries is all the more reason to insist that . . . limitations [upon prosecutorial conduct] be observed strictly") To permit misuse of these methods -- even in instances deemed harmless to a particular defendant -- could "impair public

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4/ See, e.g., Grand Jury Disclosure: Hearings on S.1676 before the Senate Committee on the Judiciary, 99th Cong. (Nov. 19, 1985); Grand Jury Reform: Hearings before the Subcommittee on Immigration, Citizenship and International Law," of the House of Representatives Committee on the Judiciary, 95th Cong. (Mar. 17 - June 29, 1977).

willingness to accept the legitimate use of those powers." Young v. United States, 107 S. Ct. at 2139-40. See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (community participation is essential to public confidence in the criminal justice system); see also M. Frankel & G. Naftalis, The Grand Jury 120 (1977) (importance of grand jury as a vehicle for citizen participation).5/

The continued viability of the grand jury process requires broad powers of

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5/ In federal courts, 81 percent of the criminal convictions obtained in fiscal 1982 were based on guilty pleas. Note, Double Jeopardy, Due Process, and the Breach of Plea Agreements, 87 Colum.L.Rev. 142, 142 n.1 (1987). Given this reality of the criminal justice system, the majority of defendants will never be judged by a jury of their peers. The grand jury is the only point where the community will participate in determining whether to impose criminal sanctions. Prosecutorial misconduct before the grand jury is thus highly detrimental to public confidence and the viability of the criminal justice system.

investigation in order to gather evidence of criminal activity. "As a grand inquest," this Court has stated, the grand jury is "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation . . . ." Blair v. United States, 250 U.S. 273, 282 (1919). Public confidence is undermined, however, if the prosecutor uses the grand jury process for purposes inconsistent with its historic role. This occurs, for example, where the government attorney uses the grand jury "'for the sole or dominating purpose of preparing an already pending indictment for trial.'" United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964)(quoting district court opinion). Where the abuse is

repeated and uncorrected -- despite admonition -- the public may properly fear "a possible revival of a version of the English Star Chamber." United States v. Doss, 545 F.2d 548, 549 (6th Cir. 1976). "[E]mployment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already indicted defendant . . . would pervert its constitutional and historical function," ibid., and thus undermine confidence in the integrity of the judicial process.

By the same token, because a grand jury's investigatory powers are so extensive, it would be extremely tempting for any Civil Division or agency attorney to seek impanelment of a grand jury -- thereby gaining access to sworn testimony and pertinent documents -- when an independent investigation has become

frustrated. Absent proof of actual prejudice to a particular defendant, strong policy reasons may nevertheless warrant dismissal in the extreme case where evidence of misconduct is cumulative and egregious.

Similarly, public confidence is undermined if the government attorney improperly enlists the grand jury to assist in administrative investigations. Dissemination of grand jury information to government experts in an unrelated civil proceeding involving third-parties might not cause actual prejudice to the defendant -- but the practice, unchecked and pervasive, would destroy the appearance of grand jury independence.

In other instances, as well, public confidence will be undermined, even where a particular defendant cannot or does not

prove actual prejudice, because of prosecutorial abuse of the grand jury process. For example, there is a strong potential for abuse when news reporters or other media representatives are called as witnesses before the grand jury, when the prosecutor has reasonable basis to believe that they will claim a First Amendment privilege not to testify. "[O]fficial harassment of the press," this Court has stated, "undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." Branzburg v. Hayes, 408 U.S. at 707-08. Under such circumstances, a particular defendant may not be able to prove actual prejudice. But the damage to public trust is great.

Concerns implicated by prosecutorial misconduct -- the integrity of the

criminal justice system, the perception of sovereign impartiality, and the ideal of public participation in the criminal process -- are too important for public confidence to leave the district courts without adequate remedy.6/ "The use of supervisory powers warns prosecutors that courts will act if prosecutors behave improperly. This warning might prevent future misconduct that otherwise would require the dismissal of indictments . . . ." Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, 45 Ohio St. L.J. at 1094. Lest the courts appear to condone conduct detrimental to the integrity of the judicial system, dismissal must remain a remedy available to the district court in an appropriate case.

6/ Dismissal, of course, leaves the prosecutor free to seek another indictment.

B. Actual Prejudice Is Difficult If Not Impossible to Prove

Finally, the requirement of actual prejudice impermissibly shifts to the defendant the burden of proving that errors caused by prosecutorial misconduct were not harmless.7/ This standard is inappropriate. It is extremely difficult, if not impossible, to prove actual prejudice even in cases where the alleged abuse or misconduct has impaired the independence and impartiality of the grand jury.

First, "[t]he prospect of peering into the grand jurors' minds, or of examining them individually, to ascertain whether . . . testimony was improperly used, is both impractical and unpalatable."

7/ By insisting that the defendant prove actual prejudice, the decision below improperly shifts the burden of proof from the government.

United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir. 1976), cert. denied, 429 U.S. 1066 (1977). As one commentator explains:

> Because the defense attorney is barred from the proceedings and because grand jury proceedings are surrounded by secrecy, the defense attorney is often uninformed about the substance of the hearings. Moreover, no one knows exactly how grand juries function and what actually influences their decisions. The testimony of jurors cannot be determinative on the question of whether they were improperly influenced. Few people will admit that they were biased. Additionally, some jurors may not realize that they were improperly influenced.

Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, supra, at 1093. As Justice O'Connor stated in an analogous jury context, "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have and interest in concealing his own bias and partly because the juror may be unaware of it." Smith v. Phillips,

455 U.S. 209, 221-22 (1982)(O'Connor, Jr., concurring); see also Marshall v. United States, 360 U.S. 310, 312 (1959)(statement of jurors that they would not be influenced by publicity not dispositive).

Moreover, the very inquiry into state of mind jeopardizes the important policy of grand jury secrecy. See e.g., United States v. Pignatiello, 582 F.Supp. 251, 253 (D.Col. 1984); United States v. Sears, Roebuck & Co., 579 F.Supp. 1055, 1056 (C.D. Cal. 1984). The requirement of grand jury secrecy is presently codified in Rules 6(d) and (e) of the Federal Rules of Criminal Procedure. Its roots, however, are "older than our Nation itself." Pittsburgh Plate Glass v. United States, 360 U.S. 395, 399 (1959). As Anglo-American law has recognized for centuries, grand jury secrecy prevents intimidation of

jurors, protects the innocent accused, and insures that the grand jury has the opportunity to make an independent examination free from undue influence. United States v. Procter & Gamble, 356 U.S. 677, 681 (1958). The important policy of grand jury secrecy should not be undermined by requiring proof of actual prejudice before the district court may dismiss an indictment when prosecutorial misconduct is so egregious as to taint the criminal justice system itself.

CONCLUSION

The injury caused by prosecutorial misconduct in the grand jury process cannot be properly be assessed if district courts are limited to asking whether the defendant would have otherwise been indicted. This Court has expressly rejected such a narrow view of its supervisory authority. Most recently, this Court noted in Young v. United States, that "what is at stake is the public perception of the integrity of our criminal justice system. 107 S.Ct. at 2140. With so much at stake, district court judges must not be deprived of the remedies that they legitimately need to exercise properly supervisory authority over the grand jury process.

For the foregoing reasons, the

decision below should be reversed.

Respectfully submitted,

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